

# Attorneys' Trust Accounts: The Bar's Role in the Preservation of Client Property

## I. INTRODUCTION

Trust is the foundation of the attorney-client relationship.<sup>1</sup> When an individual relies on an attorney for legal assistance, that person places his trust not only in the individual attorney, but also in the legal profession itself.<sup>2</sup> An attorney serves as counselor and advocate, and she is charged to fulfill these obligations according to the canons of professional ethics.<sup>3</sup> The profession itself carries the responsibility of "keeping its own house."<sup>4</sup> Effective professional self-regulation is essential to "preserving public faith in the integrity of the administration of justice" and to "maintaining the legal profession's reputation for trustworthiness."<sup>5</sup>

Never is an individual's trust in attorneys more evident, or more at risk, than when he places funds or property into the hands of his attorney.<sup>6</sup> Numerous situations may require the holding of a client's funds, including estate proceeds, escrow funds, funds for the payment of the client's taxes, and funds for settlement purposes. Other common situations may call for the receiving of funds on the client's behalf, including judgment awards, proceeds of a settlement, proceeds from the liquidation of a client's business, and proceeds from the sale of a client's real or personal property. Unfortunately, ethical violations involving the mishandling of client funds are also common. It is the obligation of the bar itself, as well as of the individual attorney to see that funds are not mishandled.

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1. "The greatest trust between man and man is the trust of giving counsel. For in other confidences, men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counsellors, they commit the whole: by how much the whole they are obligated to all faith and integrity." F. BACON, *Of Counsel*, in *THE WORKS OF LORD BACON* 277 (1846).

2. It is a trust built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the bar as an institution. No other explanation can account for clients' customary willingness to entrust their funds to relative strangers simply because they are lawyers.  
*In re Wilson*, 81 N.J. 451, 455, 409 A.2d 1153, 1154-55 (1979).

3. The codes of professional ethics differ from state to state, but generally will be in a form similar to either the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE], or the ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. For a list of the states that have adopted the new MODEL RULES as of July, 1987, see Law. Man. on Prof. Conduct (ABA/BNA) 01:3 (1987). Judges and practicing attorneys should be well aware of the ethical rules applicable in their jurisdiction.

4. "We are engaged in a profession that serves the public and enjoys a monopoly in that service. . . . The public looks to the profession to keep its own house in order . . . ." *Report of the Special Committee on Clients' Security Funds*, 84 REPORTS OF THE A.B.A. 605, quoted in *In re Member of the Bar*, 257 A.2d 382, 384 (Del. 1969), appeal dismissed, 396 U.S. 274 (1970).

5. Soule, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415, 420 (1977). "The trust placed in the lawyer owes its origin to the special professional status he occupies as a licensed practitioner. Public confidence in the practitioner is essential to the proper functioning of the profession." *State ex rel. Oklahoma Bar Ass'n v. Raskin*, 642 P.2d 262, 267 (Okla. 1982).

6. Observe that these funds are placed into accounts appropriately referred to as "Attorney Trust Accounts." "Few duties placed upon the lawyer are more fundamental, more clearly defined, more easily followed and more necessary to promote public trust and confidence in the legal profession than the absolute inviolability of an attorney's trust account." *In re Salvesen*, 94 Wash. 2d 73, 88, 614 P.2d 1264, 1271 (1980) (Stafford, J., dissenting).

This Comment focuses on the duty to preserve client property. It examines not only the ethical rules governing individual attorneys<sup>7</sup> but also the role of the legal profession itself in the preservation of client funds. Violations involving client funds (including commingling and misappropriation) account for about fourteen percent of all disbarments and about eight percent of all suspensions nationally.<sup>8</sup> This Comment focuses on efforts by the profession to decrease these startling statistics.

This Comment first examines the means available to prevent the mishandling of client funds.<sup>9</sup> These steps include the education of attorneys in the mechanics of trust account maintenance and the direct regulation of trust accounts to monitor compliance with the ethical rules. Both are essential to ensure the protection of client funds and the preservation of the public's trust in the legal profession.<sup>10</sup> Next, this Comment discusses efforts to compensate victims of attorney misconduct, such as the adoption of Clients' Security Fund programs in most states.<sup>11</sup> The success of such compensation programs is essential to the profession's claim that protection of the public is one of its primary concerns.

Finally, this Comment addresses the discipline of attorneys who misuse client funds.<sup>12</sup> It is generally recognized that in determining whether and to what extent to discipline an attorney, the principal concerns are "the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest possible professional standard for attorneys."<sup>13</sup> For misappropriation of client funds, courts generally hold that disbarment is the appropriate sanction.<sup>14</sup> However, mitigating factors are often given such weight that this sanction frequently is not imposed.<sup>15</sup> This Comment argues that mitigating factors are not as compelling

7. See *infra* section II. This Comment will not attempt to provide an indepth analysis of each state's ethical rules concerning the preservation of client property. Rather, the focus of this Comment will be on the obligations of the bar itself to see that attorneys do not mishandle client funds.

8. See Couric, *What Goes Wrong?*, 72 A.B.A. J. 65 (Oct. 1986). In individual states these percentages may be much higher. See, e.g., Johnson, *Lawyer, Thou Shall Not Steal*, 36 RUTGERS L. REV. 454, 456-59 (1984) (noting that since 1948, more than half the attorney discipline imposed in New Jersey was for financial improprieties).

9. See *infra* section III.A.

10. "[W]hen a lawyer embezzles his client's funds, the whole bar is blackened in the public eye. The rest of us, as well as the embezzler, are considered at fault because we have failed to police our own ranks and to prevent the defalcation." *Report of the Special Committee on Client's Security Funds*, 84 REPORTS OF THE A.B.A. 605, quoted in *In re* Member of the Bar, 257 A.2d 382, 384 (Del. 1969), appeal dismissed, 396 U.S. 274 (1970).

11. See *infra* section III.B.

12. See *infra* section III.C.

13. *Waysman v. State Bar*, 41 Cal. 3d 452, 458, 714 P.2d 1239, 1243, 224 Cal. Rptr. 101, 105 (1986). The courts of many states have explicitly adopted this view. See, e.g., *In re Rubi*, 133 Ariz. 491, 493, 652 P.2d 1014, 1016 (1982); *Disciplinary Board v. Kim*, 59 Haw. 449, 455, 583 P.2d 333, 337 (1978); *In re Nadler*, 91 Ill. 2d 326, 333, 438 N.E.2d 198, 201 (1982); *Louisiana State Bar Ass'n v. Alker*, 491 So. 2d 1328, 1332 (La. 1986); *Attorney Grievance Comm'n v. Pattison*, 292 Md. 599, 609, 441 A.2d 328, 333 (1982); *Mississippi State Bar Ass'n v. A Mississippi Attorney*, 489 So. 2d 1081, 1084 (Miss. 1986); *State ex rel. Nebraska State Bar Ass'n v. Statmore*, 218 Neb. 138, 143, 352 N.W.2d 875, 878 (1984); *In re Carroll*, 127 N.H. 390, 393, 503 A.2d 750, 751 (1985); *In re Wilson*, 81 N.J. 451, 456, 409 A.2d 1153, 1155 (1979); *In re Bristow*, 301 Or. 194, 206, 721 P.2d 437, 443-44 (1986); *Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 579, 506 A.2d 872, 875 (1986); *Carter v. Ross*, 461 A.2d 675, 676 (R.I. 1983); *In re Salvessen*, 94 Wash. 2d 73, 76, 614 P.2d 1264, 1265 (1980). The American Bar Association has also endorsed this approach. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.1 (1986) [hereinafter SANCTION STANDARDS]. For a detailed discussion of the SANCTION STANDARDS following their adoption, see Cameron, *Standards for Imposing Lawyer Sanctions—A Long Overdue Document*, 19 ARIZ. ST. L.J. 91 (1987).

14. See *infra* section III.C.1.

15. See *infra* section III.C.2.

in cases of misappropriation and that disbarment should be imposed more consistently.

## II. ETHICAL RULES RESPECTING CLIENTS' PROPERTY

### A. Trust Account Requirements

#### 1. Rule 1.15 and DR 9-102

The ethical rules concerning the preservation of client property are found in Rule 1.15 of the *Model Rules of Professional Conduct*<sup>16</sup> or DR 9-102 of the *Model Code of Professional Responsibility*.<sup>17</sup> The principal requirement is that funds and other property of a client must be kept separate from the attorney's business or personal funds.<sup>18</sup> The underlying rationale for the rule is that if client funds are commingled with the attorney's own funds, the separate identity of the client's funds is lost, and the money may be used to pay the attorney's business or personal expenses.<sup>19</sup> While commingling of funds can result in disciplinary action,<sup>20</sup> the sanction is likely to be

16. MODEL RULES, *supra* note 3, Rule 1.15 provides:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five] years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

17. MODEL CODE, *supra* note 3, DR 9-102 provides:

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

As noted earlier, *supra* at note 3, some states have adopted the new MODEL RULES, while others have retained the MODEL CODE.

18. MODEL RULES, *supra* note 3, Rule 1.15 (a); MODEL CODE, *supra* note 3, DR 9-102 (A). See generally Laviano & Thompson, *Trust Fund Accountability*, R.I.B.J., May 1981, at 8, discussing the fiduciary nature of an attorney's obligations with respect to his clients' funds.

19. See, e.g., *Columbus Bar Ass'n v. Tuttle*, 41 Ohio St. 2d 183, 184-85, 324 N.E.2d 753, 754 (1975) (quoting *Clark v. State Bar*, 39 Cal. 2d 161, 168, 246 P.2d 1, 5 (1952)).

20. See, e.g., *Florida Bar v. Padgett*, 481 So. 2d 919 (Fla. 1986) (six month suspension); *State v. Hohman*, 233

much more severe if client funds are actually converted to the attorney's own use.<sup>21</sup> In neither case is a claim of simple mismanagement recognized as a defense or mitigating factor.<sup>22</sup>

The rules also address the issue of "disputed funds." If an attorney and her client are in disagreement over to whom funds belong, the rule is clear: the funds are to be treated as trust funds and kept separate until the dispute is resolved.<sup>23</sup> One question not explicitly resolved in the rules is whether retainer fees are trust funds that must be safeguarded.<sup>24</sup> However, it should be clear that absent an agreement to the contrary, the attorney is not entitled to the retainer fee until she earns it by providing legal services.

Finally, the rules require the maintenance of adequate trust account records. While the *Model Code* simply requires that records be kept,<sup>25</sup> the *Model Rules* are more specific in requiring that such records be preserved for at least five years following termination of the representation.<sup>26</sup> Some states require that records be kept for longer periods.<sup>27</sup> The maintenance of such records is essential if the profession is to monitor compliance with the ethical rules.<sup>28</sup>

## 2. Interest on Lawyers' Trust Accounts

When an attorney holding funds for a client places them into an interest-bearing account,<sup>29</sup> a fundamental question arises: to whom does the interest earned belong? An attorney and her client are free to enter into an agreement concerning how interest earned on trust funds will be treated. In the absence of such an agreement, however, the position of the ABA is that interest earned on a client's trust funds belongs to the

Kan. 183, 660 P.2d 567 (1983) (public censure); *In re Witte*, 615 S.W.2d 421 (Mo. 1981), *reh'g denied*, 454 U.S. 1165 (1982) (disbarment). The ABA notes that "[b]ecause lawyers who commingle client's funds with their own subject the client's funds to the claims of creditors, . . . a period of suspension is appropriate even in cases when the client does not suffer a loss." See SANCTION STANDARDS, *supra* note 13, Standard 4.12 commentary.

21. See *infra* section III.C.

22. See, e.g., *State ex rel. Nebraska State Bar Ass'n v. Statmore*, 218 Neb. 138, 142-43, 352 N.W.2d 875, 878 (1984) ("[P]oor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds."). See also *In re Rubi*, 133 Ariz. 491, 494, 652 P.2d 1014, 1017 (1982); *Attorney Grievance Comm'n v. Boehm*, 293 Md. 476, 481, 446 A.2d 52, 54 (1982).

23. MODEL RULES, *supra* note 3, Rule 1.15(c); MODEL CODE, *supra* note 3, DR 9-102(A)(2).

24. See Comment, *Attorney Misappropriation of Client Funds*, 27 HOWARD L.J. 1597, 1600-01 (1984); see also Sobelson, *Trust Account Rules for Georgia Lawyers*, GA. SR. B.J., Aug. 1987, at 22,25 ("Obviously, the key to avoiding problems here is effective communication with the client.").

25. MODEL CODE, *supra* note 3, DR 9-102(B)(3).

26. MODEL RULES, *supra* note 3, Rule 1.15(a).

27. See, e.g., MASS. CODE OF PROF. RESP. DR 9-102(B)(3) (West 1987) (ten years); N.H. RULES OF PROF. COND. Rule 1.15(a)(2) (1987) (six years); N.J. RULE 1:21-6(b) (West 1987) (seven years); WIS. SUP. CT. RULES SCR 20:1.15(e) (1987) (six years).

28. See *infra* notes 44-46 and accompanying text.

29. In some situations, the fiduciary duty of the attorney holding client funds may call for the placing of funds into an interest-bearing account. For example, "where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and the bank charges, the lawyer should consult the client and follow the client's instructions as to investing." ABA Comm. on Ethics & Professional Responsibility, Formal Op. 348 (1982).

client.<sup>30</sup> Thus, where no agreement is reached, failure to remit to clients the interest earned on trust funds constitutes an ethical violation.<sup>31</sup>

"Interest on Lawyers' Trust Account" programs (often referred to as "IOLTA" or "IOTA" programs), however, provide an exception to the general rule.<sup>32</sup> While the details of these programs vary among jurisdictions, the fundamental concept of each is the same. Certain trust funds held by an attorney, generally those nominal in amount or held for a short term, are to be deposited in an interest-bearing account.<sup>33</sup> Where no agreement exists between the attorney and the client with respect to interest earned on the funds, the interest is to be remitted to the state bar or to a fund administered by the state. The interest is then used for a variety of programs, such as Clients' Security Funds or legal aid societies.

The ABA has taken the position that compliance with a state's IOLTA requirements is not a violation of an attorney's ethical duties respecting his client's funds.<sup>34</sup> This opinion was in part based on case law which held that such programs did not involve a "taking" of client property.<sup>35</sup> The constitutionality of IOLTA programs has been recently upheld in the Eleventh Circuit.<sup>36</sup>

In states in which IOLTA programs are mandatory, attorneys must participate or risk disciplinary action. Even where programs are voluntary, however, participation is encouraged. IOLTA programs provide funds for important public interest activities.<sup>37</sup> Interest earned on funds subject to IOLTA may be minimal in an individual case, but an aggregation of the interest statewide can be quite considerable. Using these funds for the public good will help to enhance the reputation of the profession as the public recognizes that attorneys are responsive to the needs of their community.<sup>38</sup> This will in turn better enable the profession to preserve public confidence in the integrity of the administration of justice.

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30. See *id.*, in which the Committee state its opinion that "the Model Code does not permit the lawyer to use interest earned on client funds to defray the lawyer's own operating expenses without the specific and informed consent of the client."

31. See, e.g., *Florida Bar v. Dancu*, 490 So. 2d 40 (Fla. 1986) (attorney suspended for six months and required to pass the ethics portion of the Multistate Bar Exam for failing to remit to a client interest earned on the client's funds and lying to client that no such interest was earned).

32. See generally Note, *Interest on Lawyers' Trust Accounts—Legal Issues and the Kansas Program*, 33 U. KAN. L. REV. 145 (1984). As of June, 1986, nearly all states had adopted an IOLTA program, and several states had decided that compliance with the IOLTA requirements would be mandatory (Arizona, California, Iowa, Minnesota, Ohio, Washington, and Wisconsin). See Law. Man. on Prof. Conduct (ABA/BNA) 45:202-05 (1986). Since then other states have joined in adopting a mandatory program. See, e.g., MICH. RULES OF PROF. RESP. AND CANONS DR 9-102(C) (1987).

33. See, e.g., OHIO REV. CODE ANN. § 4705.09(A)(1) (Page 1987). When larger amounts, or long-term holdings, are involved, an agreement between the attorney and the client with respect to interest to be earned is much more likely to exist. See *supra* note 29. Attorneys are given broad discretion in determining which funds held are subject to the IOLTA requirements. See, e.g., OHIO REV. CODE ANN. § 4705.09(A)(3) (Page 1987); WIS. SUP. CT. RULES SCR 20:1.15(c)(4) (1987).

34. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982).

35. *Id.* See *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981). For a list of decisions from the Supreme Courts of other states holding to the same effect, see *Cone v. State Bar*, 819 F.2d 1002, 1006 n.5 (11th Cir. 1987) (holding Florida's IOTA program constitutional).

36. *Cone v. State Bar*, 819 F.2d 1002 (11th Cir. 1987).

37. See Morgenstern, *IOLTA: "Interest on Lawyer Trust Accounts" Funding of Legal Aid in Ohio*, 58 OHIO ST. B.A. REP. 852, at 854 (1985).

38. See Hill, *A Blank Check for the Public Good*, 56 FLA. B.J. 95 (Feb. 1982); cf. Comment, *Maine's IOLTA Proposal: A Source of Supplemental Funding for Legal Services*, 36 MAINE L. REV. 359, 373-75 (1984).

### B. Duty to Report Ethical Violations

The *Model Rules* require that "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate authority."<sup>39</sup> Some commentators have taken the view that this facet of professional self-regulation is more theoretical than real, noting that in practice lawyers will more likely than not fail to report ethical violations.<sup>40</sup> Especially troubling is the thought that attorneys may be reluctant even to report the misappropriation of funds by other attorneys. Until all attorneys take this ethical duty seriously, the public's trust in the legal profession as a self-regulating profession will remain at risk.

## III. RESPONSIBILITIES OF THE LEGAL PROFESSION

### A. Preventing the Mishandling of Client Property

The responsibility of preserving client property rests in the hands of both individual attorneys and the legal profession itself. An attorney who mishandles client funds will be the first to lose that client's trust. However, the response of the legal profession to any misconduct will also be scrutinized closely by the public. Thus, a combined effort of individual attorneys and the bar is necessary to prevent the misuse of client property and thereby maintain the public's trust in the legal profession.

First, practicing attorneys must be well educated in the rules regarding client funds and the mechanics of maintaining a trust account. Several state bar associations have responded by publishing guidelines to assist attorneys in complying with the ethical rules.<sup>41</sup> Commingling often occurs simply because an attorney maintains only one account for both personal and trust funds. Loss of a client's funds in such a situation can easily occur even where there is no intent to misuse the client's funds. Strict compliance with the trust account rules can easily avoid such loss and the severe sanctions likely to accompany it. For example, in *In re Fleischer*, a three-member firm was using its trust account to pay both trust and operating expense obligations.<sup>42</sup> An auditor found that the trust account had twenty-four instances of overdrafts in a two-month period, which the court considered an invasion of specific clients' funds.<sup>43</sup> This breach of the trust account requirements resulted in temporary loss to the clients and the disbarment of all three attorneys.

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39. MODEL RULES, *supra* note 3, Rule 8.3(a) (emphasis added). See also MODEL CODE, *supra* note 3, DR 1-103.

40. See Soule, *supra* note 5, at 421 n.41.

41. See, e.g., Bell, *Trust Accounts*, 56 OHIO ST. B.A. REP. 192 (1983); Kurzer, Coleman, Leiter & Trager, *Attorneys' Trust Accounts—Rules and Pitfalls*, 55 FLA. B.J. 355 (1981); Ringuette, *You and Your Trust Fund Account*, 6 CAL. LAW. 29 (Oct. 1986); Sobelson, *supra* note 24; see also Slater, *Handling Client Funds: Honesty Isn't Enough*, NAT'L L.J., June 28, 1982, at 20, col. 1. Other means of education, including law school, bar admissions requirement, and continuing legal education should also be utilized. See Johnson, *supra* note 8, at 561-63.

42. *In re Fleischer*, 102 N.J. 440, 508 A.2d 1115 (1986).

43. *Id.* at 442, 508 A.2d at 1116. The Supreme Court of California has followed similar reasoning: "The mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation." *Giovanazzi v. State Bar*, 28 Cal. 3d 465, 474, 619 P.2d 1005, 1009, 169 Cal. Rptr. 581, 585-86 (1980).

Second, the profession must actively police trust accounts. It has long been argued that all attorney trust accounts should be subject to annual audits.<sup>44</sup> A few states have required attorneys to complete certificates of compliance or have established random audit programs, both of which reportedly have been successful in ensuring compliance with the trust account rules and, thus, in protecting client funds.<sup>45</sup> The programs serve several functions: discovery of any improprieties before damage is done to a client through purposeful or inadvertent conversion; strict enforcement of the trust fund requirements; and effective deterrence through an effective fact-finding procedure.<sup>46</sup> Adoption of these programs in all states would be a sign to the public of the profession's commitment to see that all client property will be protected when in an attorney's charge.

### B. *Compensating Victims of Attorney Misconduct*

In some situations an attorney already will have reimbursed the client for any loss suffered before any disciplinary action is initiated. However, a client whose funds are misappropriated may often be left only with the recourse of a civil suit against the attorney. Most states have responded to this obvious inequity by establishing a Clients' Security Fund into which attorneys pay periodic dues and out of which injured clients are compensated.<sup>47</sup> Unfortunately, because many of the funds do not have adequate financial resources, injured clients are often not fully compensated.

Disciplinary bodies must be cognizant that injured clients may not be fully reimbursed by the Clients' Security Fund. In such cases, where a client suffers compensable injury, the attorney causing the injury should be required to see that the victim is compensated *in full* before the attorney is permitted to resume practice.<sup>48</sup> Moreover, where the Clients' Security Fund has compensated an injured client, the fund should require full reimbursement from the individual attorney involved.<sup>49</sup> These requirements, coupled with a continuing effort to increase the financial resources of Clients' Security Fund Programs, hopefully will ensure that injured clients will be fully compensated.<sup>50</sup>

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44. See, e.g., ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 173 (Final Draft 1970), cited in Johnson, *supra* note 8, at 548 n.463; Manahan, *Lawyers Should Be Audited*, 59 A.B.A. J. 396 (1973); Soule, *supra* note 5, at 441.

45. See Couric, *Random Audit of Trust Accounts*, 72 A.B.A. J. 70 (Oct. 1986). See also Johnson, *supra* note 8, at 546-49, discussing the effectiveness of New Jersey's Random Audit Program: "It educates the bar by pointing out individual deficiencies while at the same time acts as a deterrent for a portion of that small percentage of attorneys who may be tempted to steal."

46. See Soule, *supra* note 5, at 440-45.

47. See *id.* at 423-30; see also Palermo, *Clients' Security Funds Help Our Professional Image*, 56 N.Y. St. B.J. 10 (Oct. 1984).

48. See, e.g., Florida Bar v. Van Sharman, 504 So. 2d 1236 (Fla. 1987) (attorney disbarred for three years and "required to pay restitution and costs . . . prior to seeking readmission . . ."). See also ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS Standard 6.12 (1983) [hereinafter DISCIPLINE STANDARDS]. Cf. *In re Stafford*, 106 N.M. 298, \_\_\_\_\_, 742 P.2d 510, 511 (1987) ("Where one is unable financially to make restitution, full payment might not necessarily be a precondition for reinstatement.").

49. See ABA MODEL RULES FOR CLIENTS' SECURITY FUNDS Rule 15 (1981).

50. As noted above, it must unfortunately be recognized that funds are limited and not all victims of attorney misconduct can be compensated. The ABA suggests that Clients' Security Funds set a maximum per claimant of \$10,000

### C. Discipline of Attorneys Who Knowingly Misuse Client Funds

The profession's primary method of self-regulation is the disciplinary system. As noted earlier, it is generally recognized that in determining whether and to what extent to discipline an attorney, the principal concern is "the protection of the public, preservation of confidence in the legal profession, and the maintenance of the highest possible standards for attorneys."<sup>51</sup> An attorney who has misused funds has already lost the trust of at least one client. At this point attention turns to the bar as it decides what sanctions are appropriate. Specifically, the question presented in each case is: Does the disciplinary system impose sanctions consistently and with sufficient severity to deter future misconduct and hence provide maximum protection to the public?

Generally, professional misconduct can result in sanctions ranging from a private letter of reprimand to a revocation of the license to practice law. While the primary factor in determining appropriate discipline is the type of misconduct involved, various mitigating and aggravating circumstances are also considered.<sup>52</sup> Among the mitigating factors specifically considered in misappropriation cases are restitution,<sup>53</sup> a prior unblemished disciplinary record,<sup>54</sup> evidence of good character,<sup>55</sup> a showing of remorse,<sup>56</sup> and a showing of severe personal problems.<sup>57</sup> Aggravating factors generally include failure to make restitution,<sup>58</sup> the existence of prior disciplinary infractions,<sup>59</sup> the occurrence of other misconduct at the time of the misconduct giving rise to the disciplinary action,<sup>60</sup> and the lack of a showing of remorse.<sup>61</sup>

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for each instance of misconduct and \$200,000 aggregate recovery. ABA MODEL RULES FOR CLIENTS' SECURITY FUNDS Rule 12 and Comment (1981). However, it also emphasizes that "[f]ull reimbursement is the goal of a clients' security fund." *Id.*

51. See *supra* note 13 and accompanying text.

52. These mitigating factors are listed in SANCTION STANDARDS, *supra* note 13, Standard 9.32:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical or mental disability or impairment;
- (i) delay in disciplinary proceedings;
- (j) interim rehabilitation;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

53. See, e.g., *In re Rubi*, 133 Ariz. 491, 493, 652 P.2d 1014, 1016 (1984).

54. See, e.g., *Waysman v. State Bar*, 41 Cal. 3d 452, 457, 714 P.2d 1239, 1242, 224 Cal. Rptr. 101, 104 (1986).

55. See, e.g., *Louisiana State Bar Ass'n v. Perez*, 471 So. 2d 685, 689 (La. 1985).

56. See, e.g., *In re Webb*, 105 Ill. 2d 360, 365, 475 N.E.2d 523, 525 (1985).

57. See, e.g., *In re Cutrone*, 112 Ill. 2d 261, 269, 492 N.E.2d 1297, 1301 (1986).

58. See, e.g., *Florida Bar v. Zinzell*, 387 So. 2d 346, 349 (Fla. 1980).

59. See, e.g., *People v. Vernon*, 660 P.2d 879, 881 (Colo. 1982).

60. A single act of misconduct may involve a number of ethical violations. While each violation may be relatively minor, the fact that several violations occurred may warrant severe discipline. For example, in *In re Math*, 113 A.D.2d 212, 495 N.Y.S.2d 425 (1985), an attorney was suspended for three years for: neglecting duties and obligations in representing a client; deceiving the client as to settlement of her action; tendering a check which was returned for insufficient funds; failing to reply to client's correspondence; neglecting a matter entrusted by another client; permitting the statute of limitations to expire; and failing to cooperate with the grievance committees.

61. See, e.g., *Stanley v. Board of Professional Responsibility*, 640 S.W.2d 210, 215 (Tenn. 1982).



This section of the Comment addresses the discipline imposed for the knowing misappropriation of client funds,<sup>62</sup> focusing on two primary issues: the degree of discipline deemed appropriate and the consistency with which it is imposed. The ABA has noted that "[i]nappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers."<sup>63</sup> Further, "[i]nconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems."<sup>64</sup>

### 1. Disbarment as the Appropriate Sanction

It has been stated that "[m]isappropriation of a client's property constitutes a serious violation of professional ethics and of general morality, likely to endanger the public confidence in the legal profession."<sup>65</sup> The New Jersey Supreme Court stated the case simply: "The attorney has stolen his clients' money. No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined."<sup>66</sup> Considering the egregiousness of this type of misconduct, courts have

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62. Misappropriation is not the only type of misconduct involving client funds. Others include commingling funds, failing to keep adequate records, failing to notify the client of the receipt of funds, and failing to promptly deliver funds to which the client is entitled. However, this Comment analyzes discipline for misappropriation only for several reasons: misappropriation is generally recognized as one of the most egregious forms of attorney misconduct; the client is likely to have suffered loss due to misappropriation and thus the profession's efforts to protect the client have failed; and the discipline imposed for misappropriation varies so significantly within and among jurisdictions.

Moreover, this Comment limits the examination of discipline for misappropriation to those cases where the attorney was found to have knowingly misused client funds. In some cases knowledge may be inferred, as when an attorney commingles his business and trust funds and the balance in the account falls below the amount supposedly held in trust. See *supra* note 43. However, in other cases attorneys have misused client funds with full knowledge that their client would suffer as a result of their ethical violation. No more serious breach of a client's trust can be imagined, and no situation calls for a more severe and consistent disciplinary response.

It is also recognized that misappropriation is technically not a violation of Rule 1.15. That rule does not specifically address misappropriation. Rather, the actual prohibition against misappropriation is found in Rule 8.4, which deems it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES, *supra* note 3, Rule 8.4(c); see also MODEL CODE, *supra* note 3, DR 1-102(A)(4). See Dubin & Schwartz, *Survey and Analysis of Michigan's Disciplinary System for Lawyers*, 61 U. DETROIT J. URB. L. 1, 55 (1983).

63. SANCTION STANDARDS, *supra* note 13, Preface.

64. *Id.* See also *In re Grant*, 89 Ill. 2d 247, 262, 433 N.E.2d 259, 267 (1982) (Moran, J., dissenting), *cert. denied*, 459 U.S. 838 (1982) ("[A]lthough it is necessary to consider the facts and circumstances of each case, that proposition should not be used as an aegis to attenuate the always strived-for goal of consistency.").

65. *Waysman v. State Bar*, 41 Cal. 3d 452, 457, 714 P.2d 1239, 1242, 224 Cal. Rptr. 101, 103 (1986).

66. *In re Wilson*, 81 N.J. 451, 456, 409 A.2d 1153, 1155 (1979). As another court has noted:

The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust in confidence. The direct violation of this trust by stealing a client's money, compounded by lying about it, mandates a punishment commensurate with such abuse.

*Florida Bar v. Dancu*, 490 So. 2d 40, 41-42 (Fla. 1986).

held that disbarment is usually the appropriate sanction,<sup>67</sup> and the ABA supports this view.<sup>68</sup>

## 2. Current Inconsistencies in Discipline Imposed

Recognizing first that disbarment is the appropriate sanction for misappropriation of client funds, the actual practice of attorney discipline must be evaluated in terms of the consistency with which this sanction is applied. First, it is generally recognized that attorney discipline "does not have as its objective the punishment of the offending lawyer," and that the proper discipline to be imposed "should be determined on a case-by-case basis after consideration of all the circumstances."<sup>69</sup> A wide variety of mitigating circumstances generally are recognized in cases of misappropriation.<sup>70</sup> These mitigating circumstances naturally lead to differences in discipline imposed. In cases of knowing misuse of funds, however, giving undue weight to mitigating circumstances is inconsistent with the fundamental purposes of the disciplinary system—to protect the public and to preserve public confidence in the administration of justice.<sup>71</sup> Thus, in considering discipline imposed for misappropriation of funds, the mitigating factors frequently recognized must be evaluated to determine if their consideration will truly protect the public.<sup>72</sup>

### a. Restitution

In many cases, an attorney will be given a more lenient sanction because she has made restitution. For example, in *Louisiana State Bar Association v. Hinrichs*, an attorney received a \$14,185 workers' compensation settlement on behalf of his client.<sup>73</sup> Because of a check Hinrichs had previously drawn on his trust account and postdated, the check issued to the client was returned for insufficient funds. The client was forced to hire another lawyer to sue Hinrichs for the workers' compensation settlement and damages. The client and Hinrichs eventually compromised, and

67. See, e.g., *In re Couser*, 122 Ariz. 500, 502, 596 P.2d 26, 28 (1979); *Waysman v. State Bar*, 41 Cal. 3d 452, 457, 714 P.2d 1239, 1242, 224 Cal. Rptr. 101, 103 (1986); *In re Wade*, 526 A.2d 936, 939 (D.C. 1987); *In re Bizar*, 97 Ill. 2d 127, 132, 454 N.E.2d 271, 273 (1983); *Attorney Grievance Comm'n v. Pattison*, 292 Md. 599, 609, 441 A.2d 328, 333 (1982); *In re Disciplinary Action Against Simonson*, 365 N.W.2d 259, 261 (Minn. 1985); *Connolly's Case*, 127 N.H. 786, 789-90, 508 A.2d 1054, 1057 (1986); *In re Wilson*, 81 N.J. 451, 455, 409 A.2d 1153, 1155 (1979); *Carter v. Ross*, 461 A.2d 675, 676 (R.I. 1983); *In re Salvesen*, 94 Wash. 2d 73, 76, 614 P.2d 1264, 1265 (1980).

68. See SANCTION STANDARDS, *supra* note 13, Standard 4.11.

69. *In re Salvesen*, 94 Wash. 2d 73, 76, 614 P.2d 1264, 1265 (1980). "The court should avoid adoption of rules that mandate dispositions for certain forms of misconduct. Fixed penalties limit the court's ability to deal with the complexity and variety of circumstances involved in each matter." DISCIPLINE STANDARDS, *supra* note 48, Standard 7.1 commentary.

70. See *supra* notes 52-57 and accompanying text.

71. See *supra* notes 63-64 and accompanying text. "The modest discipline of public censure the court imposes [in this case of commingling and misappropriation] threatens the public's respect for the legal profession and will impair the public's confidence in this court's regulation of the bar." *In re Deragon*, 398 Mass. 127, 133-34, 495 N.E.2d 831, 834 (1986) (Wilkins, J., dissenting).

72. The following discussion will focus on mitigating factors solely in the context of disciplinary actions for knowing misappropriation. It is recognized that this analysis may be more generally applied to the consideration of mitigating factors in cases of other attorney misconduct. However, this broader application is generally beyond the scope of this Comment.

73. *Louisiana State Bar Ass'n v. Hinrichs*, 475 So. 2d 749 (La. 1985).

Hinrichs paid the client \$3,500 in damages as well as the balance of the workers' compensation award.<sup>74</sup> The court found that Hinrichs had indeed "commingled and converted his client's funds to his own use,"<sup>75</sup> and noted that "in such cases long-term suspension or disbarment can be warranted."<sup>76</sup> However, the court concluded that because Hinrichs "had completed full restitution,"<sup>77</sup> it would refrain from "applying the most extreme remedies."<sup>78</sup> Hinrichs was suspended for twenty-four months.<sup>79</sup> Other states have given similar weight to restitution as a mitigating factor, noting that in such cases the most severe discipline is not warranted as the client has suffered no actual loss.<sup>80</sup>

Some courts have refused to adopt this view of restitution. In *In re Wilson*, the New Jersey Supreme Court found the attorney guilty of two counts of misappropriation, involving \$23,000 and \$4,300 respectively.<sup>81</sup> Wilson had returned the funds as to the first count, which raised the question of restitution as a mitigating factor. The court refused to give any weight to restitution, noting that while "[r]estitution may compensate an individual complainant for the financial loss suffered,"<sup>82</sup> its existence fails to "significantly retard the subtle but progressive erosion of public confidence in the integrity of the bench and bar."<sup>83</sup> The court further found that giving any weight to restitution "creates the impression that sanctions are proportioned in accordance with ability to pay, rather than gauged against the seriousness of the misconduct."<sup>84</sup> After rejecting other mitigating factors,<sup>85</sup> Wilson was disbarred.<sup>86</sup>

In considering the disciplinary system as a whole, it seems the proper approach is somewhere between these two extremes. As noted earlier, the disciplinary process must be concerned with compensating the injured client as well as with preventing future misconduct.<sup>87</sup> Even the *Wilson* decision recognized that "refusal to consider restitution in this class of cases removes an incentive for compensation of injured parties."<sup>88</sup> However, relying on the effectiveness of programs such as Clients'

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74. *Id.* at 749-50.

75. *Id.* at 751.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 752. This result was reached despite the facts that no other mitigating circumstances were present, and that Hinrichs had been subject to at least sixteen prior complaints, four of which resulted in private or public reprimand. *Id.* at 751-52.

80. See, e.g., *In re Rubi*, 133 Ariz. 491, 493, 652 P.2d 1014, 1016 (1982) (attorney suspended for one year); *Waysman v. State Bar*, 41 Cal. 3d 452, 459, 714 P.2d 1239, 1244, 244 Cal. Rptr. 101, 105 (1986) (attorney suspended for six months); *Florida Bar v. Kent*, 484 So. 2d 1230, 1231 (Fla. 1986) (attorney suspended for three years); *In re Bizar*, 97 Ill. 2d 127, 132, 454 N.E.2d 271, 273 (1983) (attorney suspended for one year); *In re Deragon*, 398 Mass. 127, 132, 495 N.E.2d 831, 833-34 (1986) (attorney receives public censure).

81. *In re Wilson*, 81 N.J. 451, 453, 409 A.2d 1153, 1154 (1979).

82. *Id.* at 458, 409 A.2d at 1156.

83. *Id.*

84. *Id.* at 459, 409 A.2d at 1156-57. The Supreme Court of Oklahoma also found this concern sufficient to warrant refusal to consider restitution as a mitigating factor. See *State ex rel. Oklahoma Bar Ass'n v. Raskin*, 642 P.2d 262, 267 (Okla. 1982).

85. The *Wilson* decision's views of other mitigating circumstances are discussed *infra* notes 100-01, 121, and 135 and accompanying text.

86. *In re Wilson*, 81 N.J. 451, 461, 409 A.2d 1153, 1158 (1979).

87. See *supra* section III.B.

88. *In re Wilson*, 81 N.J. 451, 459, 409 A.2d 1153, 1157 (1970). Whether encouraging restitution is worth the

Security Funds,<sup>89</sup> the *Wilson* court declared that "[f]rom this point of view, compensation of injured parties should not be deemed an appropriate function of our disciplinary process."<sup>90</sup> Even if Clients' Security Funds are provided with nearly unlimited resources, such a blanket statement seems unjustified.<sup>91</sup>

However, this is not to say that restitution alone should be sufficient to warrant a sanction more lenient than disbarment. One must recognize that "[t]he mere circumstance of restitution is likely to be fortuitous and to depend upon conditions and circumstances that afford no reliable test of a person's moral fitness as a lawyer."<sup>92</sup> Remembering that leniency lowers public confidence in professional self-regulation,<sup>93</sup> courts should be reluctant to deviate from the normally appropriate sanction of disbarment when restitution is the only mitigating factor present. Thus, to accommodate the numerous competing objectives of the disciplinary process, it seems that the best course is to consider restitution as a mitigating factor, but not to make its consideration outcome determinative. A sanction other than disbarment should be imposed only where other significant mitigating circumstances are shown. This would preserve the incentive to make restitution without wholly sacrificing the desired goal of consistency.

Before closing this discussion of restitution, it is necessary to distinguish between restitution made before any action is taken against the attorney and that made when the attorney is under pressure of a civil suit or ethics investigation. Restitution made of the attorney's own volition, before any action is brought, shows intent not to injure the individual client and should be analyzed as above. However, when the attorney does not repay the funds until forced to do so, the policies behind the consideration of restitution are even less compelling. Some states have explicitly made this distinction,<sup>94</sup> and the ABA favors the approach of not considering restitution that is made after an action is commenced as a mitigating factor.<sup>95</sup>

#### b. *Prior Unblemished Record*

The absence of prior misconduct may weigh heavily in an attorney's favor. In *State Bar v. Gerald*s, an attorney was charged with several acts of misconduct, including failing to preserve the identity of a client's funds, commingling a client's

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risk of decreased deterrence is a question not easily resolved. See Soule, *supra* note 5, at 421 n.40, where the author argues that "[b]y withholding discipline when restitution is made, the ethical standards of the profession are not maintained and the confidence of the public is diminished."

89. See generally, *supra* section III.B.

90. *In re Wilson*, 81 N.J. 451, 459 n.3, 409 A.2d 1153, 1157 n.3 (1979).

91. The ABA favors the approach of considering restitution as a mitigating factor: "Such a policy will encourage lawyers to make restitution, reducing the degree of injury to the client and helping insure that the lawyer has recognized the wrongfulness of his conduct." SANCTION STANDARDS, *supra* note 13, Standard 9.3 commentary. "Whenever possible, the disciplinary process should facilitate restitution to the victims of the respondent's misconduct without requiring victims to institute separate proceedings at their own expense." DISCIPLINE STANDARDS, *supra* note 48, Standard 6.12 commentary.

92. *State ex rel. Oklahoma State Bar Ass'n v. Raskin*, 642 P.2d 262, 267 (Okla. 1982). See also *In re Salvesen*, 94 Wash. 2d 73, 86, 614 P.2d 1264, 1270 (1980) (Stafford, J., dissenting).

93. See *supra* note 63 and accompanying text.

94. See, e.g., *Smiley v. Board of Comm'rs*, 286 Ala. 216, 230, 238 So. 2d 716, 730 (1970); *Disciplinary Bd. v. Kim*, 59 Haw. 449, 454, 583 P.2d 333, 337 (1978); *In re Stewart*, 104 N.M. 337, 340, 721 P.2d 405, 408 (1986).

95. SANCTION STANDARDS, *supra* note 13, Standard 9.4(a).

funds, and using a client's funds for his own gain without the client's permission.<sup>96</sup> The hearing panel had recommended disbarment, and the State Bar Grievance Board issued an order permanently revoking Gerald's license.<sup>97</sup> On appeal, the Michigan Supreme Court reduced the severity of the discipline from permanent disbarment to a three-year suspension, "[i]n light of Mr. Gerald's 'pervasively unblemished record' as well as the totality of circumstances surrounding the relationship between Gerald and [the] client . . . ."<sup>98</sup> Other states have given this factor similar consideration in misappropriation cases.<sup>99</sup>

Not all courts, however, have adopted this view. The New Jersey Supreme Court found that "the prior outstanding career, . . . often considered a mitigating factor in disciplinary matters, seems less important to us where misappropriation is involved. . . . [T]o distinguished practitioners, its grievousness should be even clearer."<sup>100</sup> As for the argument that a prior unblemished record is evidence of an intent to avoid future misconduct, the court deemed "the unlikelihood of subsequent misappropriation irrelevant in these cases."<sup>101</sup> Some commentators have argued that an unblemished record "[i]s inappropriate as mitigation when the offense involves dishonesty."<sup>102</sup> At best it is entitled to some minimal weight, but it should never by itself justify a sanction other than disbarment.

### c. Remorse or Admission of Guilt

A more lenient sanction may be imposed where the attorney admits her misconduct and shows that she is truly sorry for what she has done. This was the case in *In re Webb*, where an attorney was found to have converted more than \$400 of his client's money.<sup>103</sup> Despite the fact that the attorney had never made restitution, he was not disbarred. In suspending the attorney for two years and conditioning reinstatement on the making of restitution, the Illinois Supreme Court noted: "He admits his misconduct. He acknowledges that he erred. He wants to make restitution. We think, under the circumstances of this case, the respondent should not be disbarred."<sup>104</sup>

96. *In re Gerald*, 402 Mich. 387, 389, 263 N.W.2d 241, 242 (1978).

97. *Id.* at 388, 263 N.W.2d at 241.

98. *Id.* at 391, 263 N.W.2d at 243. For a discussion of other issues involved in *Gerald*, see Dubin & Schwartz, *supra* note 62, at 52-53.

99. See, e.g., *In re Burns*, 139 Ariz. 487, 493, 679 P.2d 510, 516 (1984) (attorney suspended for one year); *Waysman v. State Bar*, 41 Cal. 3d 452, 457, 714 P.2d 1239, 1242, 224 Cal. Rptr. 101, 105 (1986) (attorney suspended for six months); *Florida Bar v. Perri*, 435 So. 2d 827, 829 (Fla. 1983) (attorney suspended for three years); *In re Young*, 111 Ill. 2d 98, 104, 488 N.E.2d 1014, 1017 (1986) (attorney receives public censure); *Louisiana State Bar Ass'n v. Perez*, 471 So. 2d 685, 689 (La. 1985) (attorney suspended for 18 months); *In re Deragon*, 398 Mass. 127, 133, 495 N.E.2d 831, 834 (1986) (attorney receives public censure); *In re Walton*, 251 N.W.2d 762, 764 (N.D. 1977) (attorney suspended for six months); *In re Salvesen*, 94 Wash. 2d 73, 77, 614 P.2d 1264, 1265 (1980) (attorney suspended for two years).

100. *In re Wilson*, 81 N.J. 451, 459-60, 409 A.2d 1153, 1157 (1979).

101. *Id.* at 460 n.4, 409 A.2d at 115 n.4. After noting that the unlikelihood of recurrence alone would never be sufficient to warrant lesser discipline, the court reasoned that "[i]f we state that we might nevertheless consider it 'but only in conjunction with other factors' falsely attributes importance to a factor almost universally present in these matters." *Id. Accord State ex rel. Oklahoma Bar Ass'n v. Raskin*, 642 P.2d 262, 268 (Okla. 1982). Cf. *In re Burns*, 139 Ariz. 487, 493, 679 P.2d 510, 516 (1984) (attorney suspended for one year rather than disbarred, in light of the fact that it did not "appear that the respondent [was] likely to repeat his past misconduct.").

102. Dubin & Schwartz, *supra* note 62, at 28.

103. *In re Webb*, 105 Ill. 2d 360, 364, 475 N.E.2d 523, 524 (1985).

104. *Id.* at 365, 475 N.E.2d at 525.

The rationale behind considering remorse as a mitigating factor appears to be the recognition of a connection between remorse and an intent not to engage in the misconduct in the future.<sup>105</sup> In *Waysman v. State Bar*, the California Supreme Court suspended an attorney for six months for misappropriating \$24,000 belonging to his client.<sup>106</sup> Among the mitigating factors considered in imposition of this lenient sanction was the attorney's remorse. The court noted that the attorney's "immediate acknowledgement of his wrongdoing and his prompt efforts to see restitution was made suggest that the offense was atypical."<sup>107</sup> Other jurisdictions have taken a similar view of an attorney's showing of remorse in misappropriation cases.<sup>108</sup> The ABA supports this view.<sup>109</sup>

Closely associated with an attorney's showing of remorse is her willingness to cooperate with the ethics committee investigating her alleged misappropriation. Some states have held that when the attorney fully and willingly cooperates, this fact should be considered in her favor in determining the appropriate discipline.<sup>110</sup> As with remorse, consideration of a cooperative attitude relies on a connection between recognition of prior wrongdoing and an intention to avoid such misconduct in the future. The ABA has also approved of the consideration of this factor.<sup>111</sup>

In considering remorse and cooperation as mitigating, however, the courts should be careful not to give these factors undue weight. Cooperation is itself an ethical requirement,<sup>112</sup> the breach of which may give rise to disciplinary action.<sup>113</sup> Failure to cooperate may also be a significant aggravating circumstance in a misappropriation case.<sup>114</sup> Further, a showing of remorse is as likely to be motivated simply by a desire to return to practice as by a true acceptance of the gravity of the misconduct.<sup>115</sup> Thus, it seems that in general a showing of contrition or a willingness to cooperate should have very little, if any, effect on the discipline imposed.

105. See, e.g., *In re Salvesen*, 94 Wash. 2d 73, 78, 614 P.2d 1264, 1266 (1980) ("His demonstrated ability to conform his conduct to the requirements of the profession, along with his expressions of contrition, are certainly factors we must take into account.").

106. *Waysman v. State Bar*, 41 Cal. 3d 452, 455, 714 P.2d 1239, 1241, 224 Cal. Rptr. 101, 102 (1986).

107. *Id.* at 459, 714 P.2d at 1244, 224 Cal. Rptr. at 105.

108. *Florida Bar v. Perri*, 435 So. 2d 827, 829 (Fla. 1983) (attorney suspended for three years); *In re Discipline of Gubbins*, 380 N.W.2d 810, 812 (Minn. 1986) (attorney suspended for four months); *Bar Ass'n of Greater Cleveland v. Sanders*, 24 Ohio St. 3d 5, 6, 492 N.E.2d 449, 450 (1986) (attorney suspended for one year).

109. SANCTION STANDARDS, *supra* note 13, Standard 9.32(l).

110. See, e.g., *McCray v. State Bar*, 38 Cal. 3d 257, 274, 696 P.2d 83, 94, 211 Cal. Rptr. 691, 701 (1985) (attorney suspended for six months); *Florida Bar v. Kent*, 484 So. 2d 1230, 1231 (Fla. 1986) (attorney suspended for three years); *In re Deragon*, 398 Mass. 127, 133, 495 N.E.2d 831, 834 (1986) (attorney receives public censure); *In re Shaw*, 298 N.W.2d 133, 135 (Minn. 1980) (attorney receives public reprimand); *In re Noble*, 100 Wash. 2d 88, 93, 667 P.2d 608, 611 (1983) (attorney suspended for 90 days).

111. SANCTION STANDARDS, *supra* note 13, Standard 9.32(e).

112. See MODEL RULES, *supra* note 3, Rule 8.4(d), which deems it misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice." See also a similar provision in MODEL CODE, *supra* note 3, DR 1-102(A)(5).

113. See, e.g., *Committee on Professional Ethics & Conduct v. Stienstra*, 390 N.W.2d 135 (Iowa 1986) (attorney issued a public reprimand for failure to cooperate); *In re Wanderman*, 100 A.D.2d 309, 474 N.Y.S.2d 111 (1984) (attorney receives public reprimand for failure to cooperate).

114. See, e.g., *In re Stillo*, 68 Ill. 2d 49, 55, 368 N.E.2d 897, 899 (1977) (attorney disbarred).

115. See *In re Salvesen*, 94 Wash. 2d 73, 86, 614 P.2d 1264, 1270 (1980) (Stafford, J., dissenting).

#### d. Other Mitigating Factors

An attorney may receive a lesser sanction where he can present uncontested testimony concerning his good character.<sup>116</sup> Evidence that the attorney enjoys a good reputation in the community may also be considered.<sup>117</sup> In evaluating these factors, one should first note that any testimony of good character will obviously be inconsistent with the seriousness of the misconduct. Hence, its consideration seems entitled to little, if any, weight. Reputation evidence, however, has been found relevant depending on what is presented. Since protection of the public is the primary goal, it can be argued that reputation evidence will bear on the question of what protection the public needs if that evidence is based on the attorney's reputation *in light of* the misconduct. The argument follows that unless the attorney can show that her misconduct is widely known in the community, evidence of her reputation is not sufficiently reliable for a disciplinary body or a court to consider.<sup>118</sup> However, it seems the best policy is not to consider any reputation evidence as mitigating, because a public willing to trust an attorney known to have misused funds seems to need even greater protection.

Some states have held that the personal problems of the attorney may mitigate severe discipline. Such problems may include financial difficulties,<sup>119</sup> as well as marital break-up or other family difficulties.<sup>120</sup> Whether this approach adequately protects the public is debatable at best. While failure to consider the attorney's problems may seem harsh, "the sympathy engendered by the impossible plight of the attorney which caused him to steal is offset by the fact that he did so, most often, without regard for the possibility that he might be inflicting the same misery, or worse, on his innocent client."<sup>121</sup> In imposing sanctions for misappropriation, the court should not base its decision in part on whether the attorney needed the money or not. Such an approach runs contrary to the notion that a client's funds are inviolate, and, in essence, tells attorneys that their client's funds are inviolate *unless* they really need them. It seems the best approach, then, is not to consider the attorney's financial or personal problems as mitigating.<sup>122</sup>

116. Louisiana State Bar Ass'n v. Perez, 471 So. 2d 685, 689 (La. 1985) (attorney suspended for 18 months); see also *In re Disciplinary Action Against Simonson*, 365 N.W.2d 259, 261 (Minn. 1985) (attorney receives public censure).

117. See, e.g., *In re Rubi*, 133 Ariz. 491, 494, 652 P.2d 1014, 1016 (1982) (attorney suspended for one year); Florida Bar v. Kent, 484 So. 2d 1230, 1231 (Fla. 1986) (attorney suspended for three years); *In re Bizar*, 97 Ill. 2d 127, 132, 454 N.E.2d 271, 273 (1983) (attorney suspended for one year); Louisiana State Bar Ass'n v. Perez, 471 So. 2d 685, 689 (La. 1985) (attorney suspended for 18 months); *In re Shaw*, 298 N.W.2d 133, 135 (Minn. 1980) (attorney receives public reprimand); *In re Walton*, 251 N.W.2d 762, 764 (N.D. 1977) (attorney suspended for six months).

118. See, e.g., *In re Salvesen*, 94 Wash. 2d 73, 78, 614 P.2d 1264, 1266 (1980).

119. See, e.g., *Smith v. State Bar*, 37 Cal. 3d 17, 25, 687 P.2d 259, 263, 206 Cal. Rptr. 545, 549 (1984) (attorney receives four-year stayed suspension and is placed on four-year probation); *In re Cutrone*, 112 Ill. 2d 261, 269, 492 N.E.2d 1297, 1301 (1986) (attorney suspended for two years).

120. See, e.g., *Office of Disciplinary Counsel v. Kagawa*, 63 Haw. 150, 158-59, 622 P.2d 115, 121 (1981) (attorney suspended for four years); *In re Cutrone*, 112 Ill. 2d 261, 269, 492 N.E.2d 1297, 1301 (1986) (attorney suspended for two years).

121. *In re Wilson*, 81 N.J. 451, 461 n.6, 409 A.2d 1153, 1157 n.6 (1979); accord *State ex rel. Oklahoma Bar Ass'n v. Raskin*, 642 P.2d 262, 268 (Okla. 1982).

122. Cf. SANCTION STANDARDS, *supra* note 13, Standard 9.32(c).

However, this approach may go too far, since the term "personal problems" encompasses a wide variety of circumstances that may suggest a need for special treatment. For example, the dilemma of alcohol dependency is one that deserves a well-reasoned approach. The legal profession has long been forced to recognize the prevalence of this problem among attorneys, and in recent years various efforts have been made to assist and rehabilitate those who suffer from alcoholism.<sup>123</sup> The troubling question is in determining to what extent alcoholism should bear on the outcome of attorney disciplinary proceedings.<sup>124</sup> In *Attorney Grievance Commission v. Willemain*, the Maryland Court of Appeals states that "[b]ut for the fact that alcohol has been found to be at the root of Willemain's problem and thus that he was not his own master, we would disbar him without hesitation."<sup>125</sup> In *Waysman v. State Bar*, the California Supreme Court considered as mitigating the fact that the attorney had made considerable efforts to overcome his alcohol problem.<sup>126</sup> Other states have considered alcoholism as a mitigating factor in these contexts.<sup>127</sup>

Alcoholism, however, is not universally considered a mitigating factor. In *Carter v. Ross*, an attorney misappropriated over \$30,000 from the estate of a client, using some of the funds to "reimburse another client"<sup>128</sup> and the balance "to pay the expenses involved in maintaining his law office and his family."<sup>129</sup> Ross offered as a mitigating factor the fact that "he had recently finally accepted the fact that he was an alcoholic."<sup>130</sup> While the court wished him well in his rehabilitation, it nevertheless ordered disbarment, noting that the court has an overriding "responsibility of doing everything within reason to safeguard a client's funds from an unfit attorney, whatever the cause of his unfitness may be."<sup>131</sup> This result seems harsh, and cannot be reconciled with the views of other courts discussed above. The legal profession should be attentive to alcohol-related problems.<sup>132</sup> Indeed, refusing to consider alcohol

123. See, e.g., Blodgett, *Helping Alcoholic Lawyers*, 72 A.B.A. J. 22 (Nov. 1986); Morley, *Lawyers Helping Lawyers*, 20 ARK. LAW. 36 (Jan. 1986).

124. See generally Goldstein, *The Role of Alcoholism in Judicial Discipline Decisions*, 16 LOY. U. CHI. L.J. 549 (1985); Note, *In re Driscoll: Illinois' New Approach in the Discipline of Alcoholic Attorney Misconduct*, 31 DE PAUL L. REV. 433 (1982).

125. *Attorney Grievance Comm'n v. Willemain*, 305 Md. 665, 680, 506 A.2d 245, 253 (1986).

126. *Waysman v. State Bar*, 41 Cal. 3d 452, 459, 714 P.2d 1239, 1244, 224 Cal. Rptr. 101, 105 (1986).

127. See, e.g., *Florida Bar v. Headley*, 475 So. 2d 1213, 1214 (Fla. 1985) (attorney placed on 6 to 12 month suspension for failure to pay bar dues, in light of attorney's seeking alcoholism rehabilitation); *Office of Disciplinary Counsel v. Silva*, 63 Haw. 585, 595, 633 P.2d 538, 545 (1981) (attorney disbarred for misappropriation of client's funds, in light of lack of showing of progress in alcoholism rehabilitation); *In re Johnson*, 332 N.W.2d 616, 618 (Minn. 1982) (court suspends and publicly censures attorney for misappropriation of funds, and adopts five criteria for determining when alcoholism should be given weight as a mitigating factor); *In re Kumbera*, 91 Wash. 2d 401, 405, 588 P.2d 1167, 1170 (1979) (attorney suspended for one year for misappropriation of funds, in light of attorney's having sought and received treatment for alcoholism).

128. *Carter v. Ross*, 461 A.2d 675, 676 (R.I. 1983).

129. *Id.*

130. *Id.*

131. *Id.*

132. We do not completely close the door. We never will. The Alcoholism Advisory Committee established by interested lawyers and professionals has already aided the Court and the disciplinary process in understanding these issues. New efforts undertaken by the State Bar Association give reason to hope that we may someday better begin to understand and deal with the effects of this disease in the profession. See also R. 1:20-9 (incapacity and "disability inactive" status).

*In re Hein*, 104 N.J. 297, 305, 516 A.2d 1105, 1108-09 (1986).



dependency as mitigating will be unlikely to deter future alcoholism. For this special problem, as well as the related problem of drug dependency, some approach between the two extremes should be sought. The Disability Inactive Status is one alternative.<sup>133</sup> Another alternative may be suspension for a term with reinstatement conditioned upon the attorney's rehabilitation.

While some states have also considered youth or inexperience as a potential mitigating factor,<sup>134</sup> in a case of misappropriation these factors seem of little relevance. As one court has noted, "[t]his offense against common honesty should be clear even to the youngest."<sup>135</sup> There is no reason to believe that a young dishonest lawyer will become more honest as he grows older,<sup>136</sup> and the profession should not ask the public to bear such a risk.

### 3. Need for Consistency

The preceding discussion has evaluated the consideration of mitigating factors in cases of misappropriation. The array of such factors, however, is not limited to those analyzed above. The wide variety of mitigating factors considered and the consequent inconsistency in sanctions imposed has led commentators to note:

While it is true that some of the evidence in mitigation merits consideration, much of what is presented under the rubric of mitigation would insult the intelligence of the average layman. That those who are responsible for disciplinary adjudication accept some of this mitigation may help to explain the status which the legal profession enjoys among the public and does not promote confidence in the concept of lawyer self-regulation.<sup>137</sup>

Disciplinary bodies must do more than pay lip service to their own stated view that disbarment is the appropriate sanction for the misappropriation of client funds.<sup>138</sup> The mitigating circumstances normally considered in attorney disciplinary cases are not as compelling in cases of misappropriation. Discipline for such a breach of common honesty should not be lessened simply because the attorney subsequently returns misappropriated money or feels remorse for having committed the wrong. However, courts continue to give substantial weight to these and other factors, and thus sanctions currently being imposed are inconsistent and inappropriately lenient and inconsistent with the fundamental goals of attorney self-regulation. This practice

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133. Many states have created a "Disability Inactive Status" under which they place attorneys who are subject to some temporary infirmity. *See, e.g.*, ALA. R. DISC. ENFORC. R.20 (1984); ILL. ANN. STAT. ch. 110A, para. 758 (Smith & Hurd 1985); IOWA SUP. CT. R. 118.16; NEB. SUP. CT. R. DISC. PROC. R.11.

134. *See, e.g.*, *Eshleman's Case*, 126 N.H. 1, 6, 489 A.2d 571, 574 (1985) (While the court considered the attorney's youth and inexperience, it concluded that these factors alone were not sufficient to justify a lesser sanction.).

135. *In re Wilson*, 81 N.J. 451, 460, 409 A.2d 1153, 1157 (1979).

136. *See* Dubin & Schwartz, *supra* note 62, at 26-27.

137. *Id.* at 29.

138. *See supra* section III.C.1. It is recognized that "disbarment" does not represent the same sanction in every jurisdiction. While in some states a disbarred attorney will never again be permitted to practice law, the majority of states allow a disbarred attorney to apply for readmission after a period of time. However, even where reinstatement is possible, the ABA recommends a presumption *against* readmission. SANCTION STANDARDS, *supra* note 13, Standard 2.2 Commentary. Thus when any court says "disbarment" is usually warranted in misappropriation, a permanent revocation of license is intended.

places both public confidence in the profession as a self-regulating body and the perception of efficiency and fairness of the disciplinary process at risk.<sup>139</sup>

#### IV. CONCLUSION

This Comment has attempted to evaluate the role of the bar in the preservation of client funds. While the profession enjoys the privilege of self-regulation, that authority carries the responsibility of protecting the public and preserving public confidence in the administration of justice.<sup>140</sup> Therefore, the profession must do all that it can to see that client funds are not mishandled. This includes educating attorneys in the maintenance of trust accounts<sup>141</sup> as well as direct policing of those accounts.<sup>142</sup> In response to all forms of attorney misconduct, the profession should make every effort to see that victims are fully compensated.<sup>143</sup>

Finally, discipline for knowing misappropriation must be severe and must be imposed with greater consistency. Some states hold that disbarment is the only appropriate sanction despite mitigating circumstances. This Comment does not go so far as to adopt that approach. However, it is clear that the mitigating circumstances usually offered and considered in disciplinary proceedings should be entitled to less weight in a case of misappropriation, where the attorney has shown an inability to act with common honesty. Recognizing that such misconduct warrants disbarment, courts should be reluctant to impose a lesser sanction. The public relies on the profession to license attorneys who can be trusted, and the public must be assured that this reliance is not misplaced.<sup>144</sup>

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139. See *supra* notes 63-64 and accompanying text.

140. See *supra* note 5 and accompanying text. "If the American Bar does not do its duty to the public good . . . then its trust will be taken away and public regulation will soon be making decisions for the profession which the profession should be making itself." Brown, *The Decline of Lawyers' Professional Independence*, 55 N.Y. St. B.J. 11, 18 (Nov. 1983).

141. See *supra* note 41 and accompanying text.

142. See *supra* notes 44-46 and accompanying text.

143. See *supra* section III.B.

144. A judgment of disbarment terminates the lawyer's status as a member of the bar. This is the proper discipline for stealing. It is high time we impose that discipline and discard our image of being a toothless tiger. The Bar thinks that is the appropriate discipline, the public is entitled to that protection and this court should do no less.

Florida Bar v. Kent, 484 So. 2d 1230, 1232 (Fla. 1986) (Ehrlich, J., concurring in part and dissenting in part).